Supreme Court, U.S.
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No. 91-45

IN THE

Supreme Court of the United States

October Term 1991

ROBERT M. GIRARD AND THOMAS J. DEEF,

Petitioners,

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; COMMODITY CREDIT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED

This case involves the applicability of the Administrative Procedure Act (APA) to the procedures for debarment of government contractors under the Federal Acquisition Regulations (FAR). Section 554 of the APA provides that in cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing" each agency must establish an internal separation of functions between officials who hear and decide and those who investigate and prosecute. This case presents the following basic administrative law question:

> Where agency adjudicatory action threatens liberty or property interests which may be infringed only in accordance with the constitutional requirement of procedural due process does § 554 of the APA apply notwithstanding that the adjudication is not "required by statute to be determined on the record after opportunity for agency hearing"?

LIST OF PARTIES

Pursuant to Rule 21.1, Rules of the Supreme Court, counsel for Petitioners certifies that all parties to the proceeding are listed in the caption of this petition.

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IN THE

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No. ———

ROBERT M. GIRARD AND THOMAS J. DEEF,

Petitioners,

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; COMMODITY CREDIT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND APPENDIX

Petitioners Robert M. Girard and Thomas J. Deef respectfully pray that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in this matter on April 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 930 F.2d 738 (9th Cir. 1991) (7a). The opinion of the district court in unreported (App. C, 19a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on April 15, 1991 (App. B 7a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1990).

STATUTES AND REGULATIONS INVOLVED

This case involves the adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551(6), (7), (10)(A), 10(G), 554 (1990) and the debarment provisions of the Federal Acquisition Regulations (FAR), 48 C.F.R. §§ 9.400-9.409 (1990). Relevant portions of the statutory and regulatory provisions are reproduced in the Appendix (App. A).

STATEMENT OF THE CASE

Petitioners Robert M. Girard and Thomas J. Deef are the general manager and sales manager, respectively, of United Dairymen of Arizona (UDA), a non-profit agricultural cooperative of dairy farmers. This case arises out of a May 26, 1988 notice (App. E, 32a) to them from Ralph D. Klopfenstein, Deputy Administrator of Commodity Operations, Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture (USDA) that the USDA proposed to debar them from any participation in government contracts because of their alleged participation in the submission of falsified records to the ASCS in connection with the UDA's suspension resulting from the sale of "ineligible" cheese to the Commodity Credit Corporation (CCC). 930 F.2d at 739, 9a. Klopfenstein's notice advised Petitioners that under the applicable regulations (FAR, 48

C.F.R. § 9.406-3 (1990)) they had 30 days to submit evidence on their behalf, orally or in writing, and that if no response was received within that time, he would make his debarment determination on the basis of the information available to him.

Because Klopfenstein had participated in an earlier 1985 investigation of UDA which led to its 18 month suspension from selling cheese to the CCC (930 F.2d at 739, 9a) and thereafter consulted with and participated in a continuing investigation with the USDA Office of Inspector General which led him to initiate debarment proceedings against Petitioners (App. H, 38a), Girard and Deef objected to the FAR "informal" (48 C.F.R. § 9.406-3(b) (1990)) hearing process at which Klopfenstein would act as the "debarring officer" to decide sharply contested factual matters that he had participated in developing and which formed the basis of his proposed debarment notice. They twice demanded (and were twice refused) a formal adjudicatory hearing before an administrative law judge pursuant to § 554 of the APA. 930 F.2d at 740, 9a; App. F, G, 36a, 37a.

Petitioners' district court action[1] challenged the USDA's debarment procedures on procedural due process grounds, sought a declaratory judgment that Petitioners were entitled to a formal adjudicatory hearing before an administrative law judge (ALJ) in accordance with the requirements of § 554 of the APA, and requested an order enjoining defendants from conducting any debarment proceeding except in accordance with the APA's requirements for formal adjudication. The court's order granting the Government's motion for summary judgment rejected Petitioners' procedural due process claims, failed to decide the APA issue, but stayed the debarment proceedings pending appeal (App. D, 20a).

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[1] Jurisdiction was invoked under 28 U.S.C. §§ 1331 and 2201.

In their appeal to the Ninth Circuit, Petitioners argued, on the basis of *Wong Yang Sung v. McGrath*, 339 U.S. 33, *modified*, 339 U.S. 908 (1950) (as they had in their objections to the ASCS proceeding and in the district court) that they were entitled to a formal adjudicatory hearing under § 554 of the APA, notwithstanding the absence of a statute requiring an "on the record" hearing. 930 F.2d at 743, App. B, 7a. Though the Court of Appeals acknowledged that "Klopfenstein participated in the investigation of Girard and Deef in connection with the alleged improper cheese sales" (930 F.2d at 739, 9a), the Court held that "[t]he APA does not apply . . . because a debarment hearing is not required by statute" (*id*, at 741, 13a), and "*Wong Yang Sung* is inapplicable . . . [because] [u]nder the ASCS regulations, the debarring officer is not a member of the investigative branch of the agency." *Id.* at 743, 17a.

It is this pure legal issue—whether § 554 of the APA applies to agency adjudication where liberty or property interests protected by procedural due process are implicated—that Petitioners seek to have resolved here. It is an important question of federal administrative law which involves the procedural rights not only of persons who supply goods and services to the Government[2] but of all persons or entities threatened with deprivation or impairment of substantial rights by "informal" agency adjudicatory action where no statute requires "on the record" hearings.

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[2] *See Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs*, April 1991, U.S. General Services Administration Office of Acquisition Policy. The *List* is published monthly by GSA pursuant to 48 C.F.R. § 9.404 and includes the names of all contractors debarred, suspended or proposed for debarment, the agency taking action, the cause for and effect of the action. The April 1991 *Lists* contained the names of over 4200 parties excluded from procurement programs and over 8200 from nonprocurement programs under Executive Orders No. 12549, 12689, 31 U.S.C. § 6101, note (Supp. 1990).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decision collides squarely with this Court's decision in *Wong Yang Sung v. McGrath*, 339 U.S. at 33. Though the APA provisions on separation of functions are limited by § 554(a) to "adjudication required by statute to be determined on the record after opportunity for an agency hearing", this Court held in *Wong Yang Sung* that § 554 of the APA applied because "required by statute" includes what is required by due process.

> We think that the limitation to hearings "required by statute" in § 5 [now 554] of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion.

339 U.S. at 50. *See* A. Scalia, *The ALJ Fiasco—A Reprise*, 47 U. Chi. L. Rev. 57, 78 n.88 (1979). The Immigration Act involved in the case (26 Stat. 1084, c. 55 (1891)) did not require either a hearing or a determination on the record prior to deportation, but the Court held that § 554 of the APA applied because "[t]he constitutional requirement of due process . . . permeates every . . . enactment . . . . We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings the requirement for which has been read into the statute by the Court in order to save the statute from invalidity. . . . We would hardly attribute to Congress a purpose to be less scrupulous about fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency." 339 U.S. at 49-50.

One of the purposes of the APA, the Court noted, was to provide for the selection of hearing officers "whose independence and tenure are so guarded . . . as to give the assurances

of neutrality . . . which would guarantee impartiality of the administrative process." *Id.* at 52. Such independence was thought necessary to avoid the charge that agency hearing officers "were mere tools of the agency concerned and subservient to the agency heads. . . ." *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). The FAR debarment procedures ignore that purpose. The procedures neither contemplate the need for assurances of neutrality and impartiality in the debarment process nor provide a means to test whether, or to what extent, the "debarring official" may have prejudged the issues by prior involvement in the investigatory process.

The holding of *Wong Yang Sung* was reaffirmed the following year in *Riss & Co. v. United States*, 96 F. Supp. 452, 455 (W.D. Mo. 1950), *rev'd per curiam*, 341 U.S. 907 (1951) and *Cates v. Haderlein*, 189 F.2d 369, 371-372 (7th Cir. 1951), *rev'd per curiam*, 342 U.S. 804 (1951). The three cases stand for the principle that the formal adjudicatory hearing provisions of § 554 of the APA, including the separation of functions requirement of § 554(d), apply to every adjudicatory hearing to which a person is entitled as a matter of due process. Petitioners submit that the statutory authority under which the FAR system of government procurement was adopted[3], including its debarment procedures (48 C.F.R., §§ 9.400-9.409 (1990)), must be read to incorporate the § 554 separation of functions principles articulated by the Court in *Wong Yang Sung* and its progeny.

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[3] The FAR were adopted in 1982 by the Office of Federal Procurement Policy (OFPP) established by Pub.L. 93-400, § 5, 88 Stat. 797 (1974), 41 U.S. 404(a). *See* 47 Fed. Reg. 28, 854 (July 1, 1982). Congress directed the OFPP to implement "a single Government-wide procurement regulation called the Federal Acquisition Regulation. . . ." 41 U.S.C. § 405(a) (1990).

2. Debarment constitutes "adjudication" within the meaning of § 551(7) of the APA because it is an "agency process for the formulation of an order . . . other than rulemaking." 5 U.S.C. § 551(6), (7) (1990). *See International Telephone & Telegraph Corp. Communications Equipment v. Local 134, Int'l Brotherhood of Electrical Workers, AFL-CIO,* 419 U.S. 428, 442-443 (1975). A debarment order may result in a "sanction" (5 U.S.C. § 551(10) (1990)) of "blacklisting . . . so severe that its imposition may destroy a going business." *Attorney General's Committee on Administrative Procedure, Division of Public Contracts* 4 (mimeo, monograph 1939) (quoted in *Gonzalez v. Freeman,* 334 F.2d 570, 574 n.5 (D.C. Cir. 1964)). Almost 30 years ago the Administrative Conference of the United States, Committee on Adjudication of Claims (ACUS)[4] noted the absence of the opportunity for an adversary hearing and safeguards of procedural fairness in governmental debarment actions and proposed remedies for their correction. Committee on Adjudication of Claims, Administrative Conference of the United States, *Committee Report on Debarment and Suspension of Persons From Government Contracting and Federally Assisted Construction Work* at 1-2 (Oct. 1, 1962). (Hereinafter "Report"). The ACUS Report recommended the adoption of debarment procedures requiring "opportunity [for] . . . a trial-type hearing before an impartial agency board or hearing examiner in the event that there are disputed questions of fact relevant to the debarment issue." Report at 7. Specifically, the Report noted that the "trial-type hearing afforded by this recommendation refers essentially to the kind of hearing required by § 7(c)

[4] The Administrative Conference established in 1962 by President Kennedy by Executive Order 10934, 26 Fed. Reg. 3233 (1961), preceded the permanent Administrative Conference created by 78 Stat. 615 (1964), 5 U.S.C. §§ 571-576 (1990).

[now § 556(d)] of the Administrative Procedure Act . . ." (Report at 14) which, by its terms, applies to formal adjudicatory hearings required by § 554 of the APA. 5 U.S.C. § 556(a).

Relying, in part, on the ACUS Report (334 F.2d at 574 n.5, 576 n.11), the District of Columbia Court of Appeals held in the *Gonzalez* case (per Burger J.) that persons threatened with debarment must be afforded an "on the record" hearing which comports with traditional notions of "accepted legal norms." *Id.* at 578. Following and building upon the *Gonzalez* case, the courts have held that persons charged with fraud or "lack of integrity" in their dealings with the government have a cognizable "liberty interest", arising from the right to be free from stigmatizing governmental defamation—a right which may be infringed only in accordance with the constitutional requirements of procedural due process. *See Old Dominion Dairy Prods., Inc. v. Secretary of Defense,* 631 F.2d 953, 961-963 (D.C. Cir. 1980); *ATL, Inc. v. United States,* 4 Cl. Ct. 374, 389 (1984), *rev'd on other grounds,* 736 F.2d 677, 683 (Fed. Cir. 1984); *Transco Sec., Inc. of Ohio v. Freeman,* 639 F.2d 318 (6th Cir. 1981), *cert. denied,* 454 U.S. 820 (1981); *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers,* 534 F. Supp. 1139, 1153-1154 (D.D.C. 1982), *rev'd on other grounds,* 714 F.2d 163 (D.C. Cir. 1983); *BMY Div. of Harsco Corp. v. United States,* 693 F. Supp. 1232, 1241 (D.D.C. 1988) ("debarment . . . is legal only if the contractor has been afforded full due process protections"). *Cf. Wieman v. Updegraff,* 344 U.S. 183, 190-191 (1952); *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-541 (1985).

3. The FAR debarment regulations at issue permit the combination in one person of the incompatible functions of investigating, prosecuting and judging in violation of the

separation of functions requirement of the APA. *Wong Yang Sung*, 339 U.S. at 46; *Columbia Research Corp. v. Schaffer*, 256 F.2d 677, 680 (2d Cir. 1958). Though the "formal" trial-type hearing provisions of § 556 of the APA (which requires separation of functions) applies to every hearing that must be conducted "on the record", 2 K. Davis, *Administrative Law Treatise*, §§ 10:7, 10:8 at 333, (2d ed. 1979), FAR directs the agencies to establish debarment procedures "governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness." 48 C.F.R. § 9.406-3(b) (1990). The FAR debarment procedures permit the "debarring official" to act as the decisionmaker notwithstanding that he may have participated in the investigation that prompted him to initiate the debarment process. 48 C.F.R. § 9.406-3(c)(d) (1990). There is nothing in the regulations to require the debarring official to "refer matters involving disputed material facts to another official for findings of fact". 48 C.F.R. § 9.406-3(d)(2)(ii) (1990).

Petitioners submit that such an adjudicatory process is fatally flawed because it is inconsistent with the fundamental requirements of procedural due process. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) ("the minimum requirements of due process . . . include . . . a 'neutral and detached' hearing body").

4. Certiorari should be granted to settle the inconsistent course of decisions in the application of § 554 of the APA to debarment and similar adjudicatory proceedings. The Court of Appeals held that § 554 of the APA, as construed by this Court in *Wong Yang Sung*, "does not apply in this matter because a debarment hearing is not required by statute [and] [t]he fact that the hearing is 'on the record' does not trigger an application of . . . section 554. . . ." 930 F.2d at 741, 13a.

But the applicability of § 554, as the Court acknowledged (*id.*), "does not rest on the presence or absence of the magical phrase 'on the record' ", *Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1263 (9th Cir. 1977), but rests rather on "the substantive content of the adjudication." *Steadman v. Securities and Exch. Comm'n*, 450 U.S. 91, 97 n.13 (1981) (absence of the specific phrase "on the record" "does not make the proceeding not subject to § 554").

The Court of Appeals decision in this case is in sharp contrast with the Fourth Circuit's recent decision in *Leitman v. McAusland*, No. 90-1823 (4th Cir., May 21, 1991) (1991 WL 81817), a case involving the applicability of § 554(d) to debarment proceedings under FAR 9.406-2(c). Responding to the same arguments that Petitioners here raised below, based upon *Wong Yang Sung*, the Fourth Circuit assumed that § 554 applied but found it unnecessary to decide "the thorny issue" because it was persuaded by its review of the debarment proceedings that there had been compliance with the § 554 requirement of separation of functions between prosecuting and judging. *Id.*

"On the record" language in an applicable statute is not critically required to trigger the applicability of § 554 to adjudicatory hearings. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (citing *Wong Yang Sung*). "Despite the authority of the Wong case, . . . [a] large proportion of the decisions seem to violate the holding of the Wong case." 2 K. Davis, *Administrative Law Treatise*, § 13.08, at 229 (1958). Nothing has changed 22 years later. "Courts often go wrong when they are not reminded of the Wong Yang Sung case. And some decisions are hard to reconcile with that case." 3 K. Davis *Administrative Law Treatise*, § 18.5, at 357 (1980); *see also Id.*, § 10:8, at 333-334.

Certiorari should be granted to instruct the lower courts that the combination of judging with prosecuting or investigating, prohibited by § 554(d) of the APA, applies to every adjudicatory hearing that must be conducted "on the record" as a matter of procedural due process.

5. Application of the separation of functions and formal hearing requirements of the APA to all debarment proceedings would impair no important government interest. The Secretary of Labor administers the provisions relating to "statutory"[5] debarment in the case of some sixty "Davis-Bacon and Related Acts", which expressly authorize debarment for their violation. *See* 29 C.F.R. §§ 5.1-5.32 (1990). The Labor Department's debarment regulations provide that upon request for a hearing by a contractor who has been notified of a proposed debarment "the Administrator shall refer the case to the Chief Administrative Law Judge . . . for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute." 29 C.F.R. § 5.12(b)(1). *See Janik*, 828 F.2d at 87.

Similar regulations govern debarment hearings under statutes administered by the Secretary of Housing and Urban Development. *See* 24 C.F.R. § 24.313(b) (1990). The regulation provides that in cases of proposed debarment other than those based upon an indictment, conviction or civil judgment, the hearings shall be governed by the formal adjudicatory pro-

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[5] The government's power to debar is founded either upon express authority granted by statute or upon its inherent right to avoid dealing with irresponsible bidders and contractors. *Gonzalez v. Freeman*, 334 F.2d at 577; *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 89-92 (2d Cir. 1987). *See* 1 Report of Commission on Governmental Procurement, 123-124 (1972); *see also* Whelan and Pasley, *Cases on Federal Government Contracts*, at 1060, (Foundation Press 1975). The FAR debarment regulations are applicable to non-statutory "administrative" debarment.

cedures contained in 24 C.F.R. Part 26 which provide that "[p]roceedings conducted under these rules shall be presided over by a hearing officer who shall be an Administrative Law Judge or Board of Contract Appeals Judge. . . ." 24 C.F.R. § 26.2(a) (1990).[6]

Granting persons threatened with "administrative" debarment a formal adjudicatory hearing before an ALJ, rather than a "debarring official" who may have participated in investigative or prosecutorial functions in the case would impose no significant additional burden on the government. The FAR debarment regulations already afford the contractor "an opportunity to appear with counsel, submit documentary evidence, present witnesses, . . . confront any person the agency presents; and [m]ake a transcribed record." 48 C.F.R. § 9.406-3(b)(2) (1990). Where facts are in dispute, the "debarring official" must make written findings and base any cause for debarment on "a preponderance of the evidence." 48 C.F.R. § 9.406-3(d) (1990). What the FAR debarment procedures fail to provide is the assurance of impartiality contemplated by the APA and a hearing before an ALJ qualified to determine what constitutes "reliable, probative, and substantial evidence" required by § 556(d) of the APA, 5 U.S.C. § 556(d) (1990) as the condition for imposing a sanction of debarment, rather than a hearing before a "debarring official" who may never before have conducted an evidentiary hearing.

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[6] Section 13 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 13, 42 U.S.C. § 2000e-17 (1990) prohibits debarment of a government contractor charged with breach of an approved affirmative action plan "without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5. . . ."

CONCLUSION

There is a compelling need to instruct the federal agencies and the lower courts that this Court meant what it said in *Wong Yang Sung* and to decide this far-reaching question of federal administrative law. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ADMINISTRATIVE PROCEDURE ACT

§ 551. Definitions

For the purpose of this subchapter—

. . .

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

. . .

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

. . .

(G) taking other compulsory or restrictive action;

. . .

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—
(exceptions not applicable)

. . .

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. . . .

FEDERAL ACQUISITION REGULATIONS

48 C.F.R., Subpart 9.4—Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of *ineligible* in 9.403); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

. . . .

9.403 Definitions.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

. . .

Debarment, as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is *debarred.*

Debarring official means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

. . .

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

. . .

9.406 Debarment.

9.406-1 General.

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. . . .

9.406-2 Causes for debarment.

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(2) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.406-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a rep-

resentative, information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted to the contractor, unless debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

SB4966APP

APPENDIX B

ROBERT M. GIRARD and THOMAS J. DEEF,
Plaintiffs-Appellants,

v.

RALPH D. KLOPFENSTEIN; Conservation Service, an agency of the U.S. Department of Agriculture; Commodity Credit Corporation,
Defendants-Appellees.

No. 89-16669.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 7, 1991.
Decided April 15, 1991.

Before HUG, ALARCON and WIGGINS, Circuit Judges.

ALARCON, Circuit Judge:

Robert Girard and Thomas Deef appeal from the summary judgment ordered in favor of the defendants, Ralph Klopfenstein, the Agricultural Stabilization and Conservation Service, and the Commodity Credit Corporation. Girard and Deef argue that the Agricultural Stabilization and Conservation Service's debarment proceedings violate the Administrative Procedure Act and procedural due process because the regulations which establish the procedures do not require that an administrative law judge preside. We dismiss the appeal as to Klopfenstein as moot and remand that portion of the judgment with directions to vacate the judgment for Klopfenstein only. We affirm the judgment as to the remaining defendants.

FACTUAL BACKGROUND

United Dairymen of Arizona (UDA) is a farmers cooperative which, *inter alia*, sells cheese to the Commodity Credit Corporation (CCC) under the Federal Price Support Program. Robert Girard is the President of UDA. Thomas Deef is the Sales Manager.

The CCC is under the direction of the United States Department of Agriculture (USDA). The operation and day-to-day administration of CCC domestic programs is performed by the Agricultural Stabilization and Conservation Service (ASCS). At the time of the relevant events, Ralph Klopfenstein was the Deputy Administrator, Commodity Operations, of the ASCS.

UDA has been selling barrel cheese to the ASCS since 1982. In January of 1985, the CCC discovered that some of the barrels contained 40 pound block cheese that was ineligible for the program under which the barrel cheese was purchased. The USDA Office of the Inspector General (USDA OIG) conducted a preliminary investigation. In May, 1985, Klopfenstein suspended UDA from selling cheese to the Government for 18

months, pending an investigation of its performance under the contract. On April 13, 1987, after further investigation by the USDA OIG, the ASCS informed UDA that the investigation was closed. Klopfenstein participated in the investigation of Girard and Deef in connection with the alleged improper cheese sales.

On May 26, 1988, Klopfenstein notified Girard and Deef that the CCC intended to debar them from participation involving any government contracts for one year. The notice letter advised Girard and Deef that they could challenge the proposed debarment at a hearing before an ASCS "debarring officer."

Girard and Deef requested additional information regarding the ASCS debarment proceedings. Klopfenstein informed them that he would be the debarring officer at their hearing. Girard and Deef objected. They demanded that the ASCS debarment hearing be conducted by an administrative law judge (ALJ) pursuant to the Administrative Procedure Act (APA). Klopfenstein denied their request on the ground that the ASCS debarment was an "informal" process subject only to ASCS, CCC, USDA, and Federal Acquisition Regulation (FAR) regulations. Klopfenstein gave Girard and Deef until November 5, 1988, to notify him of the date for the ASCS debarment hearings.

On November 3, 1988, Girard and Deef filed an action for declaratory relief, pursuant to 28 U.S.C. § 2201, against Klopfenstein, ASCS, and CCC in the United States District Court for the District of Arizona. They prayed for a declaration that the proposed ASCS debarment proceedings violated their constitutional right to procedural due process, an order to the ASCS and CCC to conduct ASCS debarment proceedings before an ALJ in accord with the APA, and an injunction prohibiting any other ASCS debarment proceedings.

The district court granted summary judgment in favor of the defendants. It found (1) that exhaustion of administrative remedies was required before the court would entertain the substantive claim and (2) that the ASCS debarment proceedings did not violate procedural due process. We review a grant of summary judgment de novo. *Kruso v. International Tel. and Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire and Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

DISCUSSION

We confront several issues in this case. First, whether administrative remedies must be exhausted before a person threatened with debarment by the ASCS may contest a hearing officer's alleged bias. Second, whether the CCC ASCS debarment procedures, on their face, violate the APA or procedural due process. Third, whether an ASCS debarment proceeding violates the APA or procedural due process if the presiding officer also participated in the investigation.

1. Exhaustion of Administrative Remedies

[1, 2] Girard and Deef argue that they are not barred from challenging the deprivation of their right to an impartial hearing officer *prior* to exhausting their administrative remedies "[b]ecause plaintiffs' constitutional challenge is entirely collateral to their substantive claim relating to the propriety of debarment." We review for abuse of discretion a district court's ruling concerning exhaustion of administrative remedies. *Building Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 509 (9th Cir.1989); *Southeast Alaska Conserv. Council, Inc. v. Watson*, 697 F.2d 79, 80 (9th Cir. 1982). We conclude that exhaustion of administrative remedies is not required when the constitutional or statutory validity of debarment hearing regulations is challenged.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court held that exhaustion of administrative remedies is not a prerequisite to invoking the jurisdiction of a district court when "the constitutional claim is entirely collateral to [the] substantive claim," *id.* at 330, 96 S.Ct. at 900, and raises "at least a colorable claim" that an unfavorable administrative determination would result in irreparable harm, *id.* at 331, 96 S.Ct. at 900.

In *Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986), the Supreme Court concluded that the determination whether to require exhaustion "should also be guided by the policies underlying the exhaustion requirement." *Id.* at 484, 106 S.Ct. at 2032. These policies seek to prevent "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975).

In *Cassim v. Brown*, 824 F.2d 791 (9th Cir. 1987), we formulated a three-part test to determine when exhaustion of administrative remedies is not required. We held that

> [t]he claim at issue must (1) be collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that refusal of the relief sought will cause an injury which retroactive payments cannot remedy (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility).

Id. at 795 (citations omitted).

[3] The claim that the ASCS debarment procedures violate the APA and procedural due process meets the require-

ments of the *Cassim v. Bowen* test. The constitutional validity of the ASCS debarment procedures is collateral to the question whether Girard and Deef knew of the inclusion of ineligible cheese in UDA shipments to the ASCS. Girard and Deef have made a colorable claim that they will suffer an irreparable harm if their constitutional rights are not protected at this stage of the proceedings. A finding by the ASCS that Girard and Deef lacked the integrity necessary for government contracting, even if later reversed, could have a permanently stigmatizing effect on the professional reputations and employment opportunities. Finally, exhaustion of the administrative remedies would not assist the court in determining the constitutional validity of the agency procedures. The agency hearings are designed to determine whether Girard and Deef knew of the inclusion of ineligible cheese into UDA shipments to ASCS. A factual record concerning the inclusion of ineligible cheese would not assist an Article III court in determining whether the ASCS debarment procedures comport with the requirements of procedural due process. *See Cassim*, 824 F.2d at 795 ("there [is] nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise" when the challenge is to the validity of the procedure (quoting *Bowen v. City of New York*, 476 U.S. at 485, 106 S.Ct. at 2032)). Accordingly, we hold that exhaustion of administrative remedies was not required in this matter. The district court erred in concluding that exhaustion of administrative remedies was required prior to considering the merits of a contention that a hearing before a biased administrative officer violated procedural due process.

2. The Claims Against ASCS and CCC

   A. The Administrative Procedure Act does not require that an ALJ preside over ASCS debarment hearings.

[4] Girard and Deef argue that section 554 of the Administrative Procedure Act (APA) requires an ASCS debarment hearing before an ALJ "because the hearing is an adjudication . . . notwithstanding that the section, by its terms, is limited to adjudication 'required by statute to be determined on the record after opportunity for agency hearing.'" (Citing 5 U.S.C. § 554(a) (Supp.1990).) Girard and Deef rely on *Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir.1977), for the proposition that application of the APA "does not rest on the presence or absence of the magical phrase 'on the record.'" *Id.* at 1263. They argue that the APA applies whether or not the hearing is "on the record."

The APA does not apply in this matter because a debarment hearing is not required by statute. The fact that the hearing is "on the record" does not trigger an application of the provisions of section 554 of the APA.

[5] The APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C.A. § 554(a) (Supp. 1990). A person subject to debarment for improper conduct in performing a government contract has no statutory right to an evidentiary hearing. Debarment is within the inherent authority of contracting agencies. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C.Cir.1964). As such, it is an "informal" procedure, for which a hearing is not statutorily required.

[6] The Government asserts that the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, controls the procedures at issue here. We need not consider that issue at this time because it would not change the result we reach. Section 605 of Title 41 provides:

> All claims by a contract or against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided by this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding.

41 U.S.C.A. § 605(a) (West 1987). There is no requirement in section 605 that the contracting officer hold a hearing prior to reaching a decision.

Girard's and Deef's right to present their defense at an ASCS debarment hearing derives solely from ASCS and USDA regulations. Because ASCS debarment proceedings are not required by statute, Girard and Deef are not entitled to a hearing before an ALJ under the express terms of the APA.

B. Procedural due process does not require that an ALJ preside over ASCS debarment hearings.

Girard and Deef argue that the ASCS debarment procedures, pursuant to 48 C.F.R. §§ 9.406, 409.406-3, are constitutionally deficient on their fact. They contend that the procedures "are insufficient to provide procedural safeguards sufficient to protect [their] property and liberty interests against unwarranted infringement" and thereby violate the requirements of procedural due process. "A district court's determinations on questions of law . . . which implicate con-

stitutional rights are reviewed de novo." *Wood v. Sunn*, 865 F.2d 982, 986 (9th Cir.1988).

The ASCS debarment procedures are established pursuant to the Federal Acquisition Regulations. 48 C.F.R. § 9.406-3 (b)(1) (1988). The ASCS regulations provide that a contractor must be given the opportunity to appear at an informal hearing prior to debarment. *Id.* § 409.406-3(c). The contractor must be represented by counsel and either party may call witnesses, the proceedings must "be conducted expeditiously and in such a manner that each party will have an opportunity to present all information considered pertinent to the proposed debarment." *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court explained the method for determining what process is due before a person can be deprived of a protected interest. *Id.* at 323, 96 S.Ct. at 897. The Court instructed that three factors must be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335, 96 S.Ct. at 903. The *Mathews v. Eldridge* factors have become the standard for determining whether certain challenged administrative procedures comply with the requirements of due process. K. Davis, Administrative Law Treatise § 13:12 (Supp.1989).

[7] Girard and Deef argue that the ASCS debarment procedures violate due process, because the ASCS debarment

regulations "provide no guarantee that an individual subject to debarment will receive a fair hearing before an impartial decision maker." This contention lacks merit.

[8] The Federal Acquisition Regulations, provide that the debarment procedures established by government agencies must be "consistent with principles of fundamental fairness." 48 C.F.R. § 9.406-3(b)(1) (1988). The concept of fundamental fairness includes the right to an impartial decision maker. *See Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970) ("an impartial decision maker is essential"); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) ("no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome"); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46, 70 S.Ct. 445, 451-52, 94 L.Ed. 616 (1950) (invalidating hearings conducted by active members of the investigative branch of agency who might be required to examine witnesses and present evidence on behalf of the Government). The requirement of fundamental fairness guarantees a fair hearing before an impartial trier of fact to persons facing ASCS debarment proceedings.

Girard and Deef argue that the Supreme Court's decision in *Wong Yang Sung* compels the conclusion that ASCS debarment hearings must be conducted by an ALJ. *Wong Yang Sung* is inapplicable to the matter *sub judice*.

In *Wong Yang Sung*, Immigration Service regulations provided that deportation hearings were to be conducted by active members of its investigative branch. *Id.* at 45, 70 S.Ct. at 452. The regulations required the officer who presided over Wong Yang Sung's hearing to "conduct the interrogation of the alien and the witnesses in behalf of the Government and . . . cross examine the alien's witnesses and present such evidence

as [was] necessary to support the charges in the warrant of arrest." *Id.* at 46, 70 S.Ct. at 452. The Court commented that the procedures were "a perfect exemplification of the practices so unanimously condemned" by the Congress which enacted the APA. *Id.* at 45, 70 S.Ct. at 452. The Supreme Court had previously interpreted the Deportation Statute, 26 Stat. 1084, c. 551 (1891), to require a hearing prior to deportation. *The Japanese Immigrant Case,* 189 U.S. 86, 99-101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1902). This construction was held to be necessary to save the statute from constitutional invalidity. *Id.* In *Wong Yang Sung,* the Court concluded that its interpretation of the Deportation Statute in the *Japanese Immigrant Case* brought it within the provisions of the APA. *Wong Yang Sung,* 339 U.S. at 48-51, 70 S.Ct. at 453-54. The Court said:

> We think that the limitation to "hearings required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been head into the statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority.

339 U.S. at 50, 70 S.Ct. at 454.

Under the ASCS regulations, the debarring officer is not a member of the investigative branch of the agency. Furthermore, the regulations, on their face, do not merge the functions of prosecutor and decision-maker. In *Wong Yang Sung,* a hearing, required under the Deportation Statute, was conducted in a way which denied due process.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and its progeny, the courts have upheld numerous procedural schemes other than the one in the APA. *See Cassim v. Bowen*, 824 F.2d 791, 798 (9th Cir.1987) (citing cases upholding administrative procedures that did not comport with the APA). As discussed above, the procedures set forth at 48 C.F.R. §§ 9.406, 509.406-3 comport with the fundamental fairness requirements of due process. Therefore, the rationale of *Wang Yang Sung* has no application to the ASCS debarment regulations.

3. The Claims Against Klopfenstein

Girard and Deef assert that our decision in *Grolier, Inc. v. F.T.C.*, 615 F.2d 1215 (9th Cir.1980), prevents Klopfenstein from presiding at their ASCS debarment hearings. In *Grolier*, a Federal Trade Commission ALJ presided over an administrative hearing in which the appellant was charged with unfair competition and deceptive business practices. *Id.* at 1217. The ALJ had served as an attorney-advisor to an FTC commissioner during a period in which Grolier had been investigated and charged by the FTC. *Id.* Grolier moved the FTC to disqualify the ALJ and for an evidentiary hearing to determine whether the ALJ had been exposed to prejudicial *ex parte* information while an attorney-advisor. *Id.* The FTC denied the motion. Grolier appealed directly to this court, under 15 U.S.C. § 45. We reversed, holding that, in such circumstances, section 554(d) of the APA required an evidentiary hearing. *Id.* at 1221-22.

[9] Subsequent to the filing of the notice of appeal in this matter, Klopfenstein resigned from the ASCS. Thus, any issue regarding his ability to serve as an impartial debarring officer has become moot. In *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), the

Supreme Court instructed that when events occur after the filing of the notice of appeal that render an issue moot, the proper procedure is to dismiss the appeal with instructions to the district court to vacate the judgment on that issue. *Id.* at 39-40, 71 S.Ct. at 106-07; *Intn'l Brotherhood of Teamsters, Etc., Local Union No. 2702 v. Western Airlines,* 854 F.2d 1178 (9th Cir.1988); *Fulz v. Rose,* 833 F.2d 1380 (9th Cir.1987); *United States v. Silva and Silva Accountancy Corp.,* 641 F.2d 710 (9th Cir.1981). "When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Munsingwear,* 340 U.S. at 40, 71 S.Ct. at 107.

The appeal of the summary judgment in favor of Klopfenstein is DISMISSED. The district court is instructed to vacate the judgment in favor of Klopfenstein. The judgment for the remaining defendants is AFFIRMED.

APPENDIX C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file date on the attached decision of the Court.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____
DEPUTY CLERK

FILED OCT. 12, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT M. GIRARD, et. al.,

Plaintiffs,

vs.

RALPH KLOPFENSTEIN, et al.,

Defendants.

No. CIV 88-1811 PHX CAM

ORDER

On March 1, 1989, Defendants filed their Motion for Summary Judgment. Plaintiffs filed a response and cross-motion but the Court refused to consider plaintiffs' filings because they exceeded the page limit. Rule 11(e), Rules of Practice of U.S. Dist. Court for the Dist. of Arizona. The Court ordered rebriefing and specifically sought further discussion of due process considerations in light of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). On July 24, 1989, plaintiffs filed their Opposition to Defendants' Motion and Plaintiffs' Cross-Motion for Summary Judgment, accompanied by a separate statement

of facts. Defendants subsequently filed an opposition to plaintiffs' cross-motion and reply. On Friday, September 8, 1989, the Court heard oral arguments on these matters.

In this declaratory judgment action, plaintiffs make two arguments. First, they argue that defendants' current informal hearing process violates due process. Second, plaintiffs argue that the undisputed facts entitled them as a matter of law to a formal Administrative Procedure Act (APA) hearing. Defendants argue that the undisputed facts as a matter of law indicate that their informal hearing process is constitutionally sufficient. After careful consideration, the Court rules as follows:

BACKGROUND

Plaintiffs, Robert Girard and Thomas Deef, are employees of United Dairymen of Arizona (UDA), a cheese processing company that sold cheddar cheese to the Commodity Credit Corporation (CCC).

The CCC is a federal instrumentality created by Congress to support farm prices. The CCC has authority to support the price of milk and milk products by purchasing them on the open market. 7 U.S.C. § 1446(d)1. The day-to-day operations of CCC's domestic programs are performed by the Agricultural Stabilization and Conservation Services (ASCS). Both CCC and ASCS are within the U.S. Department of Agriculture (USDA).

On August 30, 1983, ASCS issued a statement (Announcement Dairy-1) describing the conditions under which bulk dairy products would be purchased. Regulations provide that the purchase of milk products by CCC is subject to the terms and conditions of purchase announcements. 7 C.F.R. § 1430.282.

Upon re-sampling of the cheddar cheese purchased from UDA, it was discovered that the cheese failed to conform to

Dairy-1 specifications. After further investigations, CCC concluded that from June 1982, to December 1984, plaintiffs were aware of and participated in an attempt to cover-up the sale of cheese failing to meet the Dairy-1 specifications.

CCC has proposed to debar plaintiffs from eligibility to participate in procuring government contracts for one year for their lack of integrity. Based on regulations, CCC provided plaintiffs with an opportunity to present evidence at an informal hearing to rebut CCC's charges[1].

Ralph Klopfenstein is the Deputy Administrator, Commodity Operations, of the ASCS. In a letter clarifying points made in the Notice of Proposed Debarment, Klopfenstein indicated that he would be the debarring officer at plaintiffs' informal hearing. Plaintiffs contend that Klopfenstein also participated in investigative functions for the ASCS in connection with plaintiffs' debarment.

Plaintiffs have refused to participate in any informal hearing. Plaintiffs contend they will not be able to fully perform their responsibilities with UDA if they are debarred from participating in any contracts between CCC and UDA.

ANALYSIS

I. DUE PROCESS CONSIDERATIONS

In evaluating whether defendants' informal debarment hearing process is constitutionally sufficient, the Court's analysis concentrates on the three due process considerations emphasized by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

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[1] 48 C.F.R. § 9.406-3(b)(2) provides an informal hearing process for proposed disbarments of contractors. At these hearings contractors are given an opportunity to appear with counsel, submit documentary evidence, present witnesses, confront any person the agency presents, and make a record.

But, before exploring the due process considerations, it is noteworthy to point out that by filing this action the plaintiffs have not even allowed themselves the opportunity of initiating administrative remedies (much less exhausting them). *See, Peter Kewitt Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983). Plaintiffs' failure to exhaust administrative remedies has handicapped the Court's effort to address the merits of plaintiffs' due process arguments.

A. PLAINTIFF'S PRIVATE INTEREST

The first consideration that the Supreme Court weighed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is the nature of the plaintiff's private interests that will be affected. Girard and Deef argue that their private interests will be affected in two ways by the proposed debarment.

First, if plaintiffs are debarred, they supposedly will not be able to perform their responsibilities and duties at UDA in a satisfactory manner. Plaintiffs suggest, although unsupported by affidavit or any other evidence, that it is possible that UDA would have to remove plaintiffs from their present positions. Continuing in gainful employment can be a protected property interest under the Fifth Amendment's due process clause. *See, Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538-41 (1985); *Feinberg v. FDIC*, 522 F.2d 1335, 1340, n.9 (D.C. Cir. 1975).

However, the government may exercise a great deal of flexibility in contracting. "[N]o one has a right to a Government Contract." *AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) *cert. denied* 443 U.S. 915 (1979) citing *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Plaintiffs' argument that they are being deprived of the property interest of continuing in gainful employment is weak.

Plaintiffs' second argument is that they have a liberty interest to be free from stigmatizing governmental defamation. An agency determination that a prospective government contractor lacks integrity has been recognized as a threat to the prospective contractors "right to be free from stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business." *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 961-966 (D.C. Cir. 1980). In denying contract eligibility, the government must provide the aggrieved party with some due process considerations. *Gonzales v. Freeman*, 334 F.2d 570, 577 (D.C. Cir. 1964). Thus, it appears that plaintiffs' interests do require due process protection.

B. POSSIBILITY OF ERRONEOUS DEPRIVATION?

Next, *Mathews v. Eldridge* requires an appraisal of the challenged procedure's reliability, fairness, and "the probable value, if any, of additional procedural safeguards." 424 U.S. at 343. The parties have several differences of opinion in this area.

1. APA REQUIREMENTS

Plaintiffs argue that the proceedings to debar them are an "adjudication" within the meaning of the APA, 5 U.S.C. § 551(7). An "order," as defined by the APA, 5 U.S.C. § 551(6), debarring plaintiffs would constitute a "sanction" within the meaning of the APA, 5 U.S.C. § 551(10)(G). According to plaintiffs, the APA formal trial-type hearing procedure with an independent decision-maker is required for their debarment proceeding.

The formal hearing requirements of § 554(a) of the APA applicable to "adjudications," by its terms applies to adjudications "required by statute to be determined on the record after opportunity for agency hearing . . . ." Congress has

not explicitly recognized that debarment procedures must be formal nor has it required that an ALJ preside over such informal proceedings. Defendants' current informal hearing procedures are authorized by regulation and not by statute.

However, as explained in 2 Davis, *Administrative Law Treaties*, (2d ed.) 1979 at 333, "the phrase 'required by statute to be determined on the record' has become a misfit." *See also, Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1262-1263 (7th Cir. 1977) ("the formal adjudicatory hearing provision of the APA . . . does not rest on the presence or absence of the magical phrase 'on the record' "). 2 Davis, *Administrative Law Treaties*, at 336 (2d ed. 1979), goes on to say:

> [T]he law of the future will continue to move toward abridged trials that are both quick and fair but that eliminate some of the elements of full trials . . . . [C]ourts must be free to require hearings "on the record" to the extent that a party will have a chance to rebut or explain all adverse evidence the tribunal considers, without triggering the introductory clause of §554 so as to require application of all the provisions of §§554, 556, and 557.

While some of the formal hearing requirements of the APA may be appropriate to protect plaintiffs' due process rights in their debarment proceedings, the Court should allow for a flexible administrative approach.

Taking Davis' flexible approach in reviewing the regulations that defendants rely upon, the informal debarment hearing provided for in the current regulations seems consistent with the APA. *See*, footnote #1. Of course, if plaintiffs had exhausted administrative remedies the Court would be able to look to the administrative record to determine whether, in fact, the informal procedures adequately protected plaintiffs'

interests. However, at this juncture, the Court can only look to whether the regulations appear adequate.

2. LACK OF AN IMPARTIAL DECISION-MAKER

Plaintiff argues that the requirement of an impartial decision-maker is found in the current regulatory scheme. 48 C.F.R. § 9.406-3(d)(2)(ii) states that "the debarring official may refer matters involving disputed material facts to another official for findings of fact . . ." Despite Plaintiffs' contention that an independent Administrative Law Judge is necessary, the word "may" in the regulation suggests that the question of whether another official should decide material fact issues is within the discretion of defendants.

Defendants interpret the regulations to allow for Klopfenstein to be the debarment officer even though he did have some limited involvement in the investigation of plaintiffs. An administrative agency's interpretation of regulations should be given substantial deference by the Court. *See, Sierra Club v. Clark,* 756 F.2d 686, 690 (9th Cir. 1985). The Court finds no inconsistency in defendants' interpretation of the regulation.

Additionally, plaintiffs argue that, even if the current regulatory scheme is not relied on to support their position, combining advocating and adjudicating functions in the plaintiffs' debarment proceedings is substantially likely to result in a denial of due process and a denial of a fair hearing. *See, Morgan v. U.S.,* 304 U.S. 1, 19-20 (1938). An impartial decision-maker is favored to avoid the influences of the "will to win" that may be possessed by persons who have been involved with an investigation. *Grolier, Inc. v. Federal Trade Commissions,* 615 F.2d 1215, 1220 (9th Cir. 1980), *cert. denied,* 464 U.S. 891 (1983). *See also, Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) (required an impartial decision-maker

when the administrative determination turned upon issues of credibility and veracity). These cases, referred to by plaintiffs in their briefs, seem persuasive.

But, plaintiffs failed to adequately rebut or distinguish the cases cited by defendants that provide, if a suspension or debarment proceeding is necessary, the hearing official may be an individual who has participated in an earlier phase of the suspension or debarment. *Withrow v. Larkin*, 421 U.S. 35, 56-57 (1975); *ATL, Inc. v. U.S.*, 736 F.2d 677, 686-87 (Fed. Cir. 1984). It appears that in the specific area of suspensions or disbarments, the due process requirement of an impartial decision-maker can be satisfied even when the hearing officer has had some limited prior involvement in the investigation.

The factual record of Klopfenstein's involvement in the investigation process remains sparse.[2] In the absence of facts to support plaintiffs' argument that Klopfenstein would be biased, the Court cannot find that Klopfenstein's alleged impartiality would violate plaintiffs' due process. *See, White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) (courts should not presume that an administrative agency will conduct an unfair hearing). Unfortunately, this is another instance where the Court's ability to analyze the merits of plaintiffs' argument is limited because of plaintiffs' failure to exhaust administrative remedies.

---

[2] Despite having requested further factual evidence and briefing about Klopfenstein's involvement in investigating plaintiffs' alleged wrongdoing, the Court has not been informed by plaintiffs about the extent of Klopfenstein's involvement. Plaintiffs refer the Court to their Separate Statement of Facts to support their contention that Klopfenstein was thoroughly involved in the investigation process. However, the specific paragraphs cited are only supported by plaintiffs' complaint. *See*, Plaintiffs' Statement of Facts, Para. 9, 10, and 23.

3. ADDITIONAL PROCEDURAL SAFEGUARDS

7 C.F.R. § 1407.2 provides that a contractor, dissatisfied with a proposed debarment determination after an informal hearing, may appeal to the USDA Board of Contract Appeals. Should a contractor receive an adverse decision from the Board, he is entitled to appeal to the Federal Circuit of Appeals.

Plaintiffs argue that the inadequacy of the informal hearing advocated by defendants is compounded by the fact that no "additional procedural safeguards" are available to plaintiffs if they submit to the administrative process defendants advocate. Plaintiffs argue that judicial review of any agency adjudication made pursuant to defendants' informal hearing procedure pursuant to 48 C.F.R. § 9.406 is not available to plaintiffs because plaintiffs are not "contractors" for the purposes of 41 U.S.C. § 601 *et seq.* Only the UDA may be deemed a "contractor" for the purpose of the regulations pertinent to this case.

Plaintiffs argue that *Erickson Air Crane Co. of Washington, Inc. v. U.S.*, 731 F.2d 810 (Fed. Cir. 1984) provides a method of analysis which suggests that any right to appeal to the USDA Board of Contract Appeals and, subsequently, to the Federal Circuit Court of Appeals, belongs solely to the UDA and not to plaintiffs. That case says that in future cases before the Court of Appeals for the Federal Circuit, only prime contractors may be the appellant, absent special contract or regulatory provisions which might confer standing on others. *Id.* at 814.

While this Court has no intention of making a conclusive statement about another court's jurisdiction, such special regulatory provisions appear to be present in this case. In 1967, when the CCC Board merged with the USDA Board, the merger provided the USDA Board with authority "to con-

sider and determine appeals by any person barred from contracting with CCC . . ." *See*, CCC Docket CZ 160, Revision No. 1, p. 3. At the very least, plaintiffs are entitled to additional administrative review by the USDA Board if defendants' informal hearing process concludes unsatisfactorily. Plaintiffs' contention to the contrary is evidently erroneous.

Furthermore, the Court questions whether any discussion of the review issue is even appropriate at this time. Once again, plaintiffs' failure to exhaust administrative remedies raises a problem. The review issue has not yet become ripe. *See, Pacific Gas & Elec. Co. v. State Emergency Resources Conserv. & Devel. Comm.*, 461 U.S. 190 (1983). The issue would naturally become ripe only after plaintiffs received an unfavorable result in the informal debarment hearing.

Though plaintiffs' refusal to even participate in defendants' initial informal administrative hearing makes the review issue somewhat premature, the Court is satisfied, at this time, with the apparent availability of administrative and judicial review to plaintiffs.

C. THE GOVERNMENT'S INTEREST

The third consideration focused on in *Mathews v. Eldridge* is how the Government's interest would be affected if the procedure were modified.

Plaintiffs argue the Governments' interest is less significant here than it was in *Mathews v. Eldridge* because, unlike the case, the Government does not have to make any payments to plaintiffs during the pendency of a debarment determination. Still, the Government does have an interest in having debarment proceedings move along quickly. Once the actions of individuals or firms raise doubts with respect to their business integrity, CCC must act quickly to protect its programs. In *Old Dominion*, the court stated that "[i]f every governmental decision required a full blown hearing involving all parties

affected, the conduct of government business would be greatly impaired." 631 F.2d at 968.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

While the Court set out to analyze this case in terms of the due process considerations emphasized in *Mathews v. Eldridge*, another threshold consideration has become apparent. This case has aptly demonstrated that exhaustion of administrative remedies is a prerequisite for a due process claim.

Plaintiffs' reasons for failing to exhaust administrative remedies are flimsy. Plaintiffs supposedly fear that the lack of due process safeguards is sufficient reason to bypass the administrative remedies. Where it is impossible to obtain adequate relief by pursuing administrative remedies, and pursuit of them would irreparably injure plaintiffs, the exhaustion requirement is not applied. *United Farm Workers of America, AFL-CIO v. Arizona Agr. Employment Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982). *See also, Virginia Chapter, Associated General Contractors of America, Inc. v. Kreps*, 444 F.Supp. 1167, 1180 (D.C. Va. 1978). Yet, in the case before this Court, plaintiffs' arguments that the decision-maker would be biased is factually unsupported. At a minimum, plaintiffs have failed to provide evidence that they would not receive a fair and impartial hearing. *See, e.g., White Mountain Apache Tribe v. Hodel*, 840 F.2d 675 (9th Cir. 1988). If plaintiffs had exhausted administrative remedies the Court would be able to look to an administrative record to resolve many of the factual questions that exist in this case.

It is improper for the Court to "substitute its judgment for that of the agency." *See, e.g., Shane Meat Co. v. U.S. Dept. of Defense*, 800 F.2d 334, 336 (3rd Cir. 1980) quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Plaintiffs must exhaust administrative remedies.

CONCLUSION

The court in *Old Dominion Dairy Products, Inc. v. The Secretary of Defense,* 631 F.2d 935, 956 (D.C. Cir. 1980) ruled that a debarred contractor's due process rights required "notice of . . . charges . . . and some opportunity to respond to the charges before adverse action [was] taken." What courts require is a balancing of the government's interest in maintaining the integrity of its procurement by dealing with responsible contractors and the need to provide suspect contractors with adequate due process. *Id.*

The current regulations appear to strike a satisfactory balance. Although courts have overturned suspensions and debarments (e.g. based on lack of notice and lack of procedures), not a single court has declared the informal suspension and debarment procedures found at 48 C.F.R. Part 9 (or its predecessor regulations) to violate procedural due process. *See, Shane Meat Co. v. U.S. Dept. of Defense,* 800 F.2d 334, 336 n.2 (3rd Cir. 1986); *James A Merritt & Sons v. Marsh,* 791 F.2d 328, 330 (4th Cir. 1986); *Transco Security, Inc. v. Freeman,* 639 F.2d 318, 324 (6th Cir.) *cert. denied,* 454 U.S. 820 (1981).

At this time, the Court is unwilling to deviate from the apparent trend present in the prior decisions. The Court is unable to speculate whether a different result might have occurred if plaintiffs had first exhausted administrative remedies.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is granted and Plaintiffs' Cross-Motion for Summary Judgment is denied.

Dated this 10 day of Oct, 1989.

/s/ C.A. MUECKE
United States District Judge

APPENDIX E

United States Department of Agriculture
Agricultural Stabilization and Conservation Service
P.O. Box 2415, Washington, D.C. 20013

May 26, 1988

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Robert M. Girard
UDA Executive Director
c/o United Dairymen of Arizona
2036 Hardy Drive
P.O. Box 26877
Tempe, Arizona 85282

Dear Mr. Girard:

This is to notify you that the United States Department of Agriculture proposes to debar you from participating in Government contracts and Government-approved subcontracts for a period of two years.

The Federal Acquisition Regulations (FAR) at 48 C.F.R. Sec. 9.406-2 provide that causes for debarment include the willful failure to perform in accordance with the terms of the contract which indicates a serious lack of business integrity or business honesty.

Under the terms of Announcement DAIRY-1, Purchase of Bulk Dairy Products, United Dairymen of Arizona (UDA), the contractor, had to provide the date of manufacture and identification for each vat of cheese, the moisture test for each vat, the total number of containers, and the marked net weight of the lot. Upon resampling cheese remaining in CCC inventory sold to CCC by UDA under Announcement DAIRY-

1, the terms and conditions of Announcement DAIRY-1 were found to contain added cheese, ineligible for sale to CCC:

Contracts

D1558001	D1520502
D1599601	D1520503
D1557102	D1520504
D1557101	D1523003
D1599602	D1561101
D1523002	D1685602
D1523001	D1687801

An investigation conducted by the Office of the Inspector General disclosed that sufficient evidence exists to show that from June 1982 to December 1984, while you were employed by UDA, you were aware of and participated in the manufacture and sale of barrel cheese to CCC which contained added cheese which was ineligible for sale to CCC. This operation included the submission of falsified records to CCC which resulted in the sale of ineligible cheese to CCC. The investigation further dicslosed that once UDA became aware that the Government had discovered the ineligible cheese in barrels, attempts were made to cover up the knowledge and responsibility by you and other top management officials by providing further false information to CCC.

Accordingly, CCC hereby gives notice that it proposes to debar you from any action involving Government contracts or subcontracts, including any activities related to servicing (processing, repackaging, etc.) of products and commodities owned by CCC or any involvement in the manufacture and sale of products and commodities to CCC for a period of one year.

Pursuant to 48 C.F.R. Sec. 9.406-3(c) you are hereby given a period of 30 days from receipt of this letter, to submit evi-

dence on your behalf for consideration by the Debarring Officer prior to his final decision on this matter. Such information may be submitted in writing to the Debarring Officer or, if you wish, you may contact the Debarring Officer and arrange a time to present your information, either in person or through your representative. If no response is received from you within the time provided, the Debarring Officer shall determine if debarment is appropriate, based solely on the information available to him.

Sincerely,

/s/ RALPH D. KLOPFENSTEIN

Deputy Administrator,

Commodity Operations

APPENDIX F

United States Department of Agriculture
Agricultural Stabilization and Conservation Service
P.O. Box 2415, Washington, D.C. 20013

Aug. 22, 1988

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Sydney Berde
Sydney Berde & Associates, PA.
Suite 2206
American National Building
St. Paul, Minnesota 55101-1894

Dear Mr. Berde:

This responds to your recent letter in which you requested additional information with respect to the proposed debarments of your clients Robert M. Girard, Executive Director of

United Dairymen of Arizona (UDA), and Tom Deef, UDA Sales Manager, and in which you also requested a formal evidentiary hearing on behalf of your clients.

On May 26, 1988, the Commodity Credit Corporation (CCC) proposed to debar Girard and Deef based on information obtained during an investigation concluded by the Office of the Inspector General (OIG). The investigation revealed that from June 1982 to December 1984, while employed by UDA, Girard and Deef were aware of and participated in the manufacture of ineligible (rerun) cheese and the sale thereof to CCC and attempted to cover up their knowledge of and responsibility for such actions. Specifically, the proposed debarments are based on a December 12, 1985 interview of Douglas O. Handrich, a former plant manager at UDA, conducted by OIG special agent, Lori A. Hanson. The interview disclosed information which includes the following:

1. In August of 1983, in a meeting attended by Girard, Handrich, and R. K. Rogers, Handrich's former supervisor, Girard ordered Handrich and Rogers to place rerun cheese into barrels intended for delivery under CCC contracts.

2. On several occasions during late 1983 Girard told Handrich that he was not rerunning such cheese quickly enough.

3. In mid-April 1984, during a meeting in Roger's office which Handrich, Deef, Rogers, and Scott Benson, UDA Controller, attended, Girard ordered that, since a review of UDA records would reveal the placing of rerun cheese into barrels for delivery under CCC contracts, UDA would no longer keep track of such transactions.

4. Due to his working relationship with Handrich, Deef was aware that UDA was placing rerun cheese into barrels intended for delivery under CCC contracts.

With respect to your request for a hearing, the procedures that CCC uses in debarment matters are contained in the Federal Acquisition Regulations (FAR) at 48 C.F.R. Sec. 9.406-3(b) (2). The FAR provides:

> In actions not based upon a conviction or judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also —
>
> (i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and
>
> (ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

Under the FAR, CCC is not required to provide Girard and Deef with a formal hearing. Informal suspension and debarment procedures have been found to provide contractors with adequate due process safeguards. See, *Transco Security Inc. v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied* 454 U.S. 820 (1981); *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980); and *Stanko Packing Co., Inc. v. Bergland*, 489 F.Supp. 947 (D.D.C. 1980).

Accordingly, I hope that the additional information provided with respect to Girard's and Deef's proposed debarment answers the questions raised in your letter. Please notify me within 30 days from receipt of this letter of the date and time to hold Girard's and Deef's proposed debarment proceedings. Your request for a hearing in Phoenix, Arizona, is denied. However, if you can demonstrate that holding the proposed debarment proceedings in Washington, D.C., would

be unduly burdensome, please notify me and I will attempt to arrange for a mutually acceptable location.

Sincerely,

RALPH D. KLOPFENSTEIN

Debarring Officer

APPENDIX G

United States Department of Agriculture
Agricultural Stabilization and Conservation Service
P.O. Box 2415, Washington, D.C. 20013

Oct. 5, 1988

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Sydney Berde
Sydney Berde & Associates, PA.
Suite 2206
American National Building
St. Paul, Minnesota 55101-1894

Dear Mr. Berde:

This responds to your letter of September 16, 1988, in which you demanded that the proposed debarment proceedings against your clients Robert M. Girard and Tom Deef be conducted under the formal procedures of the Administrative Procedure Act (APA) and that they should be held in Phoenix, Arizona.

Your request for an APA hearing is again denied. As I stated in my letter of August 22, your clients are only entitled to an informal proceeding. See 48 C.F.R. §§ 9.406-3(b)(2) and 409.406-3(c).

Since it appears that you are planning to present at least seven witnesses, all of whom live in the Phoenix area, your request to hold the proposed debarment proceedings in Phoenix is granted. However, as stated above, such proceedings will be informal.

Failure to notify me within 30 days from receipt of this letter of the dates you would like to have the proposed informal debarment procedures take place will result in a final determination based on the current record in addition to any written material submitted by you within this time period.

Sincerely,

RALPH D. KLOPFENSTEIN

Debarring Officer

APPENDIX H

Sydney Berde
Doherty, Rumble & Butler
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and
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV-88-1811-PHX-CAM

ROBERT M. GIRARD and THOMAS J. DEEF,
Plaintiffs,

v.

RALPH D. KLOPFENSTEIN, Deputy Administrator, Commodity Operations AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, an agency of the United States Department of Agriculture and COMMODITY CREDIT CORPORATION, a corporation and agency of the United States,
Defendants.

FIRST STIPULATED STATEMENT OF FACTS

The parties in the above-captioned action, through their respective counsel, hereby stipulate and agree to the following statement of facts:

Plaintiff Robert M. Girard ("Girard") is an individual employed by the United Dairymen of Arizona ("UDA") as its Executive Director. The UDA is a non-profit agricultural marketing cooperative of dairy farmers, the members of which are primarily located in Arizona.

1. Plaintiff Thomas J. Deef ("Deef") is an individual employed by the UDA as its Sales Manager.

2. Defendant Ralph D. Klopfenstein ("Klopfenstein") is the Deputy Administrator, Commodity Operations, of the Agricultural Stabilization and Conservation Service ("ASCS"), an agency of the United States Department of Agriculture ("USDA").

3. Defendant Commodity Credit Corporation ("CCC") is a corporation created by Congress and an agency and instrumentality of the United States under the control of the USDA. The CCC "was created . . . to support farm prices . . ." 15 U.S.C. § 714 *et seq.*; *Rainwater v. United States*, 356 U.S. 590, 591 (1958). The Agricultural Act of 1949, as amended ("the Act"), 7 U.S.C. § 1421, *et seq.*, grants CCC the authority to support milk prices through purchases of milk and milk products in the marketplace.

* * *

8. This action arises out of a May 26, 1988 Notice of Proposed Debarment served upon Girard and Deef by Klopfenstein, indicating that the USDA and the CCC intended to debar the plaintiffs from any participation involving government contracts with the CCC for a period of one year (hereinafter, the "May 26 Notice of Proposed Debarment").

* * *

16. Klopfenstein will act as the Debarring Officer at any hearings held by the ASCS for the purpose of conducting debarment proceedings against Girard and Deef.

17. Klopfenstein was kept advised of the results of the investigation by the USDA concerning the alleged introduction of cheddar-type cheese to bulk barrel cheese shipped by UDA to CCC during January, February and April, 1984.

18. Klopfenstein participated in the decision made in May, 1985 to suspend UDA from patricipating in the CCC Dairy Price Support Program, and, in fact, ultimately made the decision to suspend UDA.

19. Klopfenstein or his predecessor participated in the decision to initiate debarment proceedings against Girard and Deef and, in fact, ultimately made the decision to initiate debarment proceedings against Girard and Deef.

20. Klopfenstein consulted with and received advice from persons who performed the investigative functions of ASCS in connection with the proposed debarment of plaintiffs.

* * *

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U.S. District Attorney
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Supreme Court, U.S.
FILED
AUG 30 1991
OFFICE OF THE CLERK

(2)

No. 91-45

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT M. GIRARD AND THOMAS J. DEEF, PETITIONERS

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
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STUART M. GERSON
Assistant Attorney General

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11pp

QUESTION PRESENTED

Whether an administrative law judge must preside over debarment proceedings conducted pursuant to the Federal Acquisition Regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-45

ROBERT M. GIRARD AND THOMAS J. DEEF, PETITIONERS

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-19a) is reported at 930 F.2d 738. The opinion of the district court (Pet. App. 20a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1991. The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the president and sales manager of United Dairymen of Arizona (UDA), an agricultural cooperative. Since 1982, the Commodity Credit Corporation (CCC) has purchased cheese from UDA under the Federal Price Support Program. That program is administered by the Agricultural Stabilization and Conservation Service (ASCS) of the United States Department of Agriculture (USDA). Pet. App. 8a.

In 1985, CCC discovered that some of the cheese it had purchased from UDA as "barrel cheese" was in fact "block cheese," which was ineligible for the program under which it was purchased. In May 1985, following a preliminary investigation by the USDA's Office of Inspector General, ASCS's Deputy Administrator for Commodity Operations, Ralph Klopfenstein, suspended UDA from selling cheese to the government for 18 months pending further investigation. Pet. App. 8a-9a.

In May 1988, following an additional investigation by the Office of Inspector General, Klopfenstein notified petitioners that the USDA proposed to debar them from participating in government contracts for two years. The notification letter advised petitioners that they could challenge the proposed debarment at a hearing before an ASCS official. Pet. App. 9a, 32a-34a.

Petitioners demanded that ASCS provide them with a formal hearing before an administrative law judge. Klopfenstein refused this demand on the ground that debarment proceedings are governed by regulations that do not provide for a formal hearing before an ALJ. Instead, Klopfenstein informed petitioners that he would serve as the debarring official (the official

who presides over a debarment hearing), and gave petitioners 30 days to propose a date for the hearing. Pet. App. 9a, 34a-38a.

Petitioners then filed an action in district court seeking a declaratory judgment that the Due Process Clause and the Administrative Procedure Act, 5 U.S.C. 554, entitle them to a formal hearing before an ALJ. The district court granted respondents' motion for summary judgment. Pet. App. 20a-31a. The district court held that due process does not require a formal hearing before an ALJ. *Id.* at 22a-31a. In addition, the court concluded that petitioners were required to exhaust their administrative remedies before bringing an action in district court. *Id.* at 30a-31a.

2. The court of appeals affirmed. Pet. App. 7a-19a. The court of appeals disagreed with the district court's conclusion that petitioners were required to exhaust their administrative remedies. *Id.* at 11a-12a. But the court of appeals agreed with the district court that petitioners were not entitled to a hearing before an ALJ. The court of appeals first considered (*id.* at 13a-14a) petitioners' argument that 5 U.S.C. 554, part of the Administrative Procedure Act (APA), requires that debarment hearings be conducted by an ALJ. The court rejected that contention because Section 554(a) states that the APA requirements apply only to "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing," and USDA debarment hearings are not "required by statute," but by the Federal Acquisition Regulations. The court of appeals also rejected petitioners' argument that the Due Process Clause requires that an ALJ preside over the debarment proceeding. The court observed that a Federal Acquisition Regulation, 48 C.F.R. 9.406-3, provides con-

tractors with several procedural rights, including an opportunity to appear at an informal hearing prior to debarment, to be represented by counsel, and to call witnesses. Pet. App. 15a. Applying the balancing analysis of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court concluded that these procedures satisfy the requirements of the Due Process Clause. Pet. App. 15a-18a. The court further rejected petitioners' argument that a hearing before an ALJ is required by this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 modified, 339 U.S. 908 (1950). In *Wong Yang Sung*, the court noted, the statute at issue had been construed to require a hearing, whereas in this case the hearing is required by regulation. Pet. App. 17a. In addition, the court observed, "the debarring officer is not a member of the investigative branch of the agency," and the regulations "do not merge the functions of prosecutor and decisionmaker." [1] *Ibid.*

ARGUMENT

Petitioners contend (Pet. 5-12) that an ALJ must preside at their debarment hearing, not a USDA employee who was involved in the investigation of their case or the decision to initiate debarment proceedings. That contention merits no further review.

1. The Due Process Clause does not require strict separation of adjudicative and investigatory functions. In *Withrow* v. *Larkin*, 421 U.S. 35 (1975),

[1] The court also ordered that petitioners' claims against Klopfenstein be dismissed. After petitioners filed their notice of appeal, Klopfenstein resigned from the ASCS. "Thus," the court explained, "any issue regarding his ability to serve as an impartial debarring officer has become moot." Accordingly, the court ordered that the judgment with regard to Klopfenstein be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Pet. App. 18a-19a.

the Court rejected a due process challenge to a state medical licensing board that both investigated and adjudicated allegations of professional misconduct. As the Court observed, the contention that due process forbids the combination of investigative and adjudicative functions has "been squarely rejected in prior decisions of this Court." 421 U.S. at 47. See *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). In *Withrow*, the Court explained that such constitutional objections "must overcome a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. Accordingly, the courts of appeals have rejected due process attacks on the debarment regulations. See *Transco Security, Inc.* v. *Freeman*, 639 F.2d 318, 321-323 (6th Cir.), cert. denied, 454 U.S. 820 (1981); *ATL, Inc.* v. *United States*, 736 F.2d 677, 682-683 (Fed. Cir. 1984).[2]

Nor does the APA, 5 U.S.C. 554, provide petitioners with a right to a hearing before a debarment officer who played no role in the investigation or decision to initiate debarment proceedings. To be sure, Section 554(d) provides that an agency employee who "engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision * * * except as witness or counsel in

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[2] Moreover, since Deputy Administrator Klopfenstein has resigned from the ASCS, there is no possibility that Klopfenstein will act as the debarring officer. Although an ALJ will not preside at the debarment hearing, there is no reason to assume that the official who ultimately is appointed to serve as the debarring officer in petitioners' case will have participated in the investigation of petitioners or the decision to initiate debarment proceedings against them, as Klopfenstein did.

public proceedings." 5 U.S.C. 554(d). But Section 554 applies, with certain exceptions not relevant here, only to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). Debarment hearings are not "required by statute." Instead, the right to a hearing in a debarment proceeding, and the procedures for such hearings, are established by a Federal Acquisition Regulation, 48 C.F.R. 9.406. Consequently, the APA, by its own terms, does not apply to the debarment proceeding at issue in this case.[3]

2. Petitioners nevertheless contend, relying on this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950), that "§ 554 of the APA applies to agency adjudication where liberty or property interests protected by procedural due process are implicated," even if the adjudication is not "required by statute" within the meaning of Section 554. Pet. 4. That novel proposition, if accepted, would invalidate a wide variety of informal adjudicatory arrangements by federal agencies, even though this Court has held that the requirements of the Due Process Clause are satisfied in many contexts by informal procedures short of a full trial-type hearing. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); 2 K. Davis, *Administrative Law Treatise* § 10:8, at 336-337 (2d ed. 1979) (APA does not forbid "truncated" hearings that meet requirements of due process).

Contrary to petitioners' assertions, *Wong Yang Sung* does not support their position. In that case, the Court held that the deportation hearings at issue came within Section 554 because "the requirement

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[3] Of course, once the agency renders a final debarment decision, that decision is judicially reviewable under the APA. See 5 U.S.C. 701-706.

for [hearings] has been read into a statute by the Court in order to save the statute from invalidity." 339 U.S. at 50.[4] Because the deportation statute, as construed by the Court, was the source of the right to a hearing, it followed that the hearings were "required by statute" within the meaning of Section 554(a). In this case, in contrast, no statute affords a right to a debarment hearing. Rather, the right to a hearing is based entirely on a Federal Acquisition Regulation. And there is no occasion to read such a hearing requirement into any statute, since the agency provides a hearing under the regulation that fully satisfies the requirements of the Due Process Clause.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

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[4] The Court had so read the governing statute in *The Japanese Immigrant Case*, 189 U.S. 86, 99-101 (1903).

[5] There is no basis for petitioners' contention (Pet. 10) that the decision in this case is in "sharp contrast with" *Leitman* v. *McAusland*, 934 F.2d 46 (4th Cir. 1991). In *Leitman*, the court did not reach the question whether debarment hearings are subject to 5 U.S.C. 554, but instead determined that the hearing at issue was conducted in compliance with that provision.

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No. 91-45

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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

ROBERT M. GIRARD AND THOMAS J. DEEF,

Petitioners,

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; COMMODITY CREDIT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

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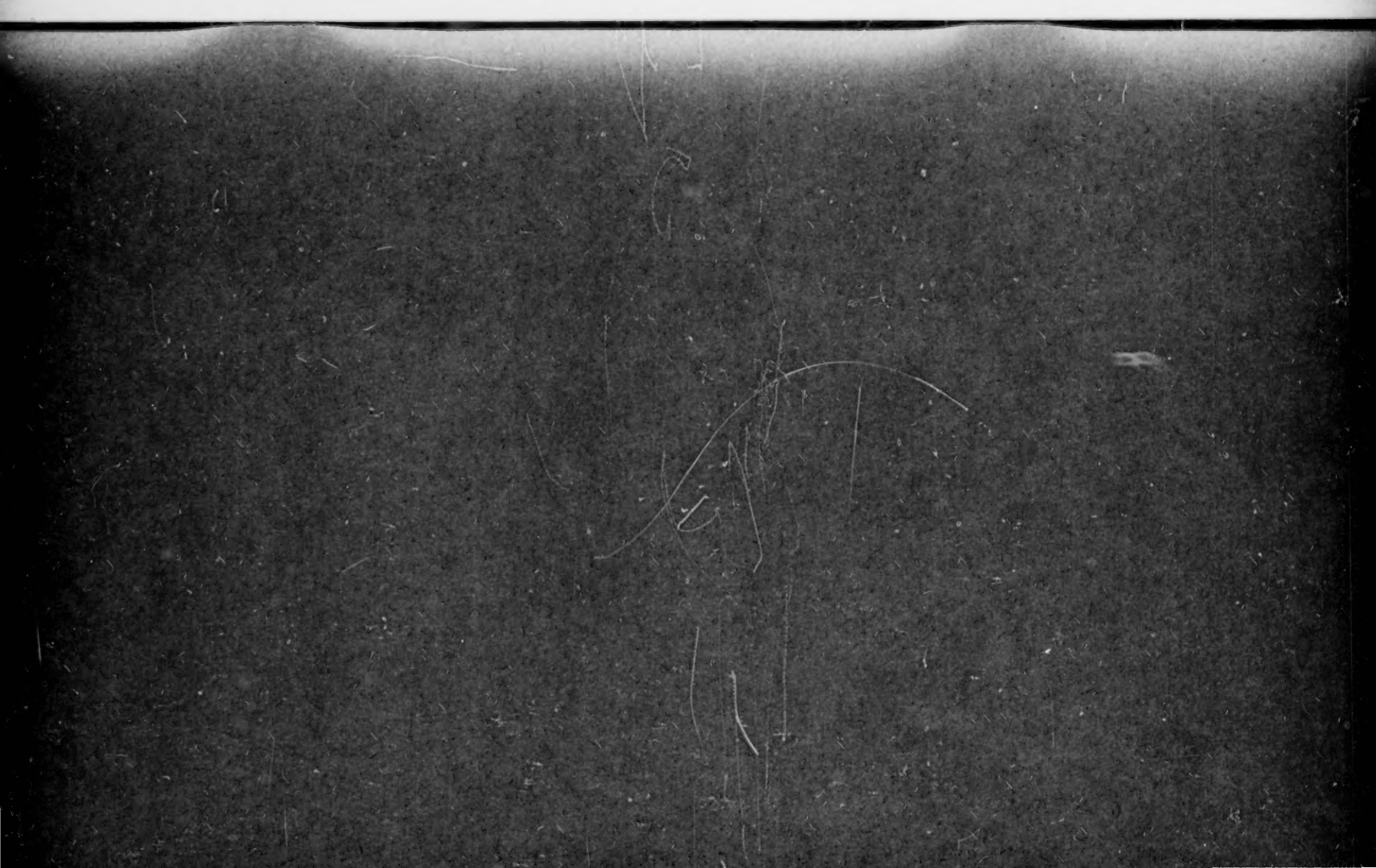

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IN THE

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OCTOBER TERM 1991

No. 91-45

ROBERT M. GIRARD AND THOMAS J. DEEF,
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v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE;
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

ARGUMENT

1. Petitioners contend that in cases of adjudication required by the Due Process Clause to be determined "on the record" after opportunity for an agency hearing, § 554 of the APA applies and requires an internal separation of functions between employees who hear and decide and those who investigate and initiate prosecution. The Brief for the Respondent in Opposition ("Resp. Br.") asserts "[t]hat contention merits no further review", Resp. Br. at 4, because "[t]he Due Process Clause does not require strict separation of adjudicative and investigatory functions." *Ibid.*

The question presented by the Petition "is not constitutionality [of the FAR debarment procedures], but rather whether there is any good reason to doubt that the APA [as applied by this Court] means what it says." *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 223 (1988) (Scalia J., concurring). Hence, cases such as *Withrow v. Larkin,* 421 U.S. 35 (1975), on which the Government relies, (Resp. Br. 4) are simply inapposite. Moreover, while the Court held in *Withrow* that the combination of investigative and adjudicative functions in Wisconsin's medical licensing board did not constitute a due process violation, what the Government fails to discern is the fundamental distinction, recognized in *Withrow,*[1] between combining functions in an agency

[1] Justice White's opinion for the Court noted "that an agency employee performed the actual investigation and gathering of evidence in this case and that an assistant attorney general then presented the evidence to the Board at the investigative hearings. While not essential to our decision upholding the constitutionality of the Board's sequence of functions, these facts . . . show that the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication. . . ." 421 U.S. at 54, n. 20.

decision-maker and permitting the *same individual* to investigate, charge and finally adjudicate the charges produced by his investigation as in this case. Pet. App. 9a.[2]

Though *Withrow* held that procedural due process was not violated when the same agency makes the initial charge or determination of probable cause and also the ultimate adjudication, the Court distinguished and noted its disapproval in prior cases of an adjudicatory process which combined the role of investigator, prosecutor and decision-maker in the same person.

> Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon *Gagnon v. Scarpelli*, 411 U.S. 778 (1983), and *Morrissey v. Brewer*, 408 U.S. 471 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decision-maker must be other than the one who made the decision under review. . . . Allowing a decision-maker to review and evaluate his own prior decisions raises problems that are not present here. . . .

421 U.S. at 58, n. 25.

The Government's reliance on *Richardson v. Perales*, 421 U.S. 389 (1971) and *FTC v. Cement Institute*, 333 U.S. 683 (1948) (Resp. Br. 5) is inexplicable. Neither case addressed the APA issue raised by the Petition nor involved an adju-

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[2] While Klopfenstein's resignation removes him as the debarring officer, there is no reason to assume, as the Government does, (Resp. Br. n.2) that another ASCS employee who participated in the investigation will not serve as the debarring officer. The FAR procedures simply fail to provide the protections required by § 554(c) and (d) of the APA.

dicatory process which combined in a single person the incompatible functions of investigating and judging. Moreover, the Social Security Administration's adjudicative hearings for deciding disability claims, involved in *Perales*, are conducted before an administrative law judge under a procedure which "does not vary from that prescribed by the APA. Indeed, the latter is modelled upon the Social Security Act." 402 U.S. at 409. See *Matthews v. Eldridge*, 424 U.S. 319, 335-339 (1976). That's all that the petitioners here seek.[3]

Transco Security, Inc. v. Freeman, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981) and *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984) (Resp. Br. 5) are similarly inapt. Neither case raised the Petition's APA question. In *ATL*, the Navy's debarment regulations afforded the contractor "a triple-layer review process" (736 F.2d at 687) which insured a separation of functions between the official who initiated the suspension process and the three-member Navy Debarment Committee which conducted the hearing and submitted its findings for final action to a higher official. *Ibid.*

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[3] The SSA's multi-step initial determination and administrative review process for handling disability claims (20 C.F.R. §§ 404.900-404.982) bears no resemblance to FAR's single step debarment process which confers on the "debarring official" final authority to "debar a contractor for any of the causes in 9.406-2. . . ." 48 C.F.R. § 9.406-1(a); Pet. App. 3a. The debarred contractor's sole remedy, deprived of a formal hearing pursuant to §§ 556 and 557 of the APA, is to seek judicial review under the narrow "arbitrary and capricious" standard of § 706(2)(A) of the APA, rather than the "more generous" scope of review provided by the "substantial evidence" test under § 706(2)(E) which is limited to cases based on a formal hearing record. *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973); *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 143 (1967). See *Association of Data Processing Service Organizations, Inc. v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984).

2. The Government contends that petitioners are not entitled to invoke the separation of functions protections of § 554 of the APA[4] because that section applies only to adjudicatory hearings "required by statute to be determined on the record", 5 U.S.C. 554(a), and "[d]ebarment hearings are not 'required by statute' [but] [i]nstead, the right to a hearing . . . and the procedures . . . are established by a Federal Acquisition Regulation." Resp. Br. 5-6. The Government characterizes petitioners' reliance on *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) to support applicability of § 554 of the APA to this case as a "novel proposition" which, if accepted, "would invalidate a . . . variety of informal . . . 'truncated' hearings that meet the requirements of due process." Resp. Br. 6.

a. Petitioners are threatened with debarment and loss of employment on the basis of charges that they engaged in conduct "which indicates a serious lack of business integrity or business honesty." Pet. App. 32a. They requested a formal hearing to dispute the charge (*id.* 36a) because petitioners' "good name, reputation, honor, or integrity is at stake". *Goss v. Lopez*, 419 U.S. 565, 574 (1971) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); see also, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

The Government has failed to cite a single case involving a liberty or property interest protected by the Due Process Clause in which this Court has upheld against a due process challenge an adjudicatory hearing procedure involving disputed adjudicative facts in which the incompatible functions

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[4] 5 U.S.C. § 554(d) provides that an agency employee who "engaged in the performance of investigative or prosecutory functions . . . may not in that or a factually related case, participate or advise in the decision . . . except as witness or counsel. . . ."

of investigating and judging were combined in a single person. The Government's facile dismissal as a "novel proposition" of petitioners' reliance on *Wong Yang Sung's* holding that "required by statute" includes what is required by due process (Resp. Br. 6) overlooks or ignores the fact that the holding of the 1950 case was twice reaffirmed by this Court the following year.[5]

b. Equally groundless is the Government's argument that acceptance of petitioner's "novel proposition" would invalidate a wide variety of informal adjudicatory arrangements by federal agencies . . . short of a full trial type hearing" (Resp. Br. 6) which this Court has upheld as satisfying the requirements of due process. *Ibid.*

First, this Court has never held that the Government may deprive a person of a substantial liberty or property interest by "informal procedures short of a full trial type hearing" (Resp. Br. 6) where there is a dispute about critical facts on which the Government's case is based and the investigator and final decision maker is the same person. There is nothing novel about the proposition that where an agency's decision turns on questions of fact, a person threatened with the stigma of governmental defamation or deprivation of sub-

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[5] In *Riss & Co. v. United States*, 341 U.S. 907 (1951) this Court reversed *per curiam*, on the basis of *Wong Yang Sung*, the lower court's refusal to apply the holding of that case to require a formal hearing prior to denial of a certificate of authority by the I.C.C. See, 96 F. Supp. 452, 454-455. In *Cates v. Haderlein*, 189 F.2d 369 (7th Cir. 1951) the court held that *Wong Yang Sung* did not require the Postmaster General to hold a formal adjudicatory hearing prior to issuance of a fraud order because "[t]he terms of the statute under which the Fraud Order . . . was issued make no provision for a hearing. . . ." *Id.* at 371. This Court reversed *per curiam* on the basis of *Wong Yang Sung*. *Cates v. Haderlein*, 342 U.S. 804 (1951).

stantial rights is entitled, as matter of due process, to an "on the record" hearing before an "impartial decision maker." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). See *I.C.C. v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963); 2 K. Davis, *Administrative Law Treatise*, § 12.10 at 448-449 (2d ed. 1979) ("A party whose interest is protected by due process is entitled to opportunity for a trial type hearing on disputed adjudicative facts); see *Id.* § 12:10 at 448-449.

Second, a "wide variety of informal adjudicatory arrangements" (Resp. Br. 6) involve proceedings in which no "on the record" hearing is required either because there is no genuine dispute about critical facts, or because "the nature of the interest at stake", *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), may be protected against unlawful infringement by "truncated . . . procedures" that satisfy due process, *Goss*, *supra* at 583[6], or the exigencies of the case require prompt but temporary action subject to a later trial-type hearing. See *e.g. Horne v. Laird*, 463 F.2d 1268, 1270-1271 (D.C. Cir. 1972); *cf. Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240-241 (1988); 2 K. Davis, *supra* § 11:12 at 388. None of those reasons apply here.

This case merits review to guide the lower federal courts in the exercise of their judgment as to when agency adjudication requires an "on the record" trial type hearing to satisfy the requirements of due process so as to trigger the application of § 554 of the APA.

c. The Government contends that petitioners' reliance on *Wong Yang Sung* to require a hearing under §554 of the APA is misplaced because in that case the requirement for a hearing

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[6] "[A] routine [school] disciplinary measure does not assume constitutional dimensions". *Goss* at 587 (Powell J. dissenting) (temporary suspension).

had been read into the governing deportation statute to save it from invalidity whereas in this case there is no statutory right to a debarment hearing, but only a "right based entirely on a Federal Acquisition Regulation." Resp. Br. 6-7.

That specious argument ignores the fact that "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital, supra,* 488 U.S. at 208. The debarment procedures at issue here, 48 C.F.R., Subpart 9.4, were adopted pursuant to 41 U.S.. § 405(a) in which Congress directed the Office of Federal Procurement Policy (OFPP) to implement "a single Government-wide procurement regulation called the Federal Acquisition Regulation. . . ." See Petition 6, n. 3. While no statute affords petitioners a right to a debarment hearing, here, as in *Wong Yang Sung*[7], without such a hearing there would be no constitutional authority for debarment. *Transco Security, Inc. v. Freeman, supra,* 639 F.2d at 321; *Gonzalez v. Freeman,* 334 F.2d 570, 578 (D.C. Cir. 1964). *Cf. Federal Deposit Insurance Corp. v. Mallen, supra,* 486 U.S. at 240; *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 260-263 (1987).

One of the "administrative evils" that it was the purpose of the APA to cure was "the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung, supra* at 41. As explained by the Attorney General's Committee on Administrative Procedure

> commingling of functions of investigation or advocacy with the functions of deciding are . . . plainly undesirable.

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[7] "[T]he difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such a hearing, there would be no constitutional authority for deportation." 339 U.S. at 49.

> But they are . . . avoidable and should be avoided by appropriate internal division of labor. . . . [T]he problem is simply one of isolating those who engage in the activity.

Attorney Gen. Comm. on Administrative Procedure, Final Report 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941). Section 554 of the APA achieves that purpose by requiring that "hearings be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed in the conduct of the hearing by agency officials engaged in the performance of investigative or prosecuting functions." Attorney General's Manual on the Administrative Procedure Act (1947) 54. Section 554 is an embodiment of the common law principle that "no man shall be a judge in his own cause." *Bonham's Case* (1610). The FAR debarment procedures, on their face and as applied in this case, ignore that principle and the specific provisions of § 554.

No express debarment statute is required to warrant resort to the remedial purposes of the APA. Indeed, the rule is the other way. The APA applies to every statute enacted thereafter except to the extent that it is modified or superseded by another statute "expressly". 5 U.S.C. § 559. See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-51 (1955). Petitioners submit that the FAR debarment procedures which permit the "debarring official . . . authorized to impose debarment", 48 C.F.R. § 9.403, to participate in investigation, as is the case here (Pet. App. 9a), violate one of the fundamental principles of the APA, "the basic structural legislation which" governs federal administrative procedure. *Bowen, supra* 488 U.S. at 216 (Scalia J. concurring).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the court of appeals.

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